United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-2303

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

-against-

ANTHONY TORRES,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against-

Docket No.
74-2303

ANTHONY TORRES,

Appellant.

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BRIEF FOR APPELLANT

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court properly admitted evidence of other crimes when no defense had been raised making such evidence material and when the evidence introduced, that of an accomplice, could hardly be regarded as "clear and convincing"?

2. Whether under the special facts of this case the defendant is entitled to a new trial where he is not displayed to the jurors as a manacled prisoner in custody?

3. Whether the prosecutor committed reversible error in summation by urging the jury, over objection, that it had a duty to protect the public from the danger of narcotics traffic?

4. Whether the cumulative impact of the error -- all tending

tc inject extraneous issues of the defendant's character and the heinousness of the crime into the trial -- is such that a new trial is required either by Due Process or by the Court's supervisory power?

PRELIMINARY STATEMENT

On the 8th day of May, 1974 a superseding indictment was returned in the Southern District of New York against defendant-appellant Anthony Torres and 13 named co-defendants (74 Cr. 472).

Count One of the indictment charged the 14 defendants, and seven named unindicted co-conspirators, "and others to the Grand Jury known and unknown" with conspiring -- commencing on or about the 1st day of July, 1970 -- to violate the old and subsequently the new narcotics law. The gist of the alleged conspiracy was that the defendants would import, possess and distribute large amounts of heroin and cocaine, smuggling the same in antique picture frames from South America into the United States. The indictment cites 21 overt acts between October 1970 and September 1971.

Count Two of the indictment charged that on or about the 12th of January, 1971 defendant-appellant Anthony Torres, a/k/a Tony T, Enrique Lopez, a/k/a El Gallego, and Juan Carlos Franco, a/k/a Miguel Aspilche, received, concealed and facilitated the transportation and concealment of "approximately 20 kilograms of a narcotic drug" knowing the narcotic drug to have been unlawfully imported in violation of Title 21, United States Code, §§ 173 and 174 and Title 18, United States Code, §2.

Count Three charged that on or about the 19th of May, 1971 the

said threesome did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance "to wit, approximately 10 kilograms of cocaine" in violation of Title 21, United States Code, §§ 812, 841(a)(1), 841(b)(1)(A), and Title 18, United States Code, § 2.

Count Four also alleged the distribution and possession with intent to distribute a quantity of cocaine on the 19th day of May, 1971. But co-defendant Roberto Rivera is substituted in the threesome for defendant-appellant Anthony Torres, and the quantity alleged is "two or more kilograms of cocaine".

Counts Five, Six and Seven allege substantive narcotics violations by co-defendants who were not parties in the trial below.

Defendant-Appellant Torres and co-defendant Roberto Rivera pleaded not guilty and were tried jointly in the United States District Court for the Southern District of New York before Judge John M. Cannella and a jury. On August 12, 1974 both were found guilty on all counts charged.*

On the 13th day of February, 1975 Torres was sentenced as

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* On September 30, 1974, a second narcotics offender information pursuant to 26 USC §7237(c)(2) (repealed) was filed against Torres regarding Count Two of the indictment. On November 21, 1974, a trial, without a jury, was had by Torres on the question of identity between himself and the person convicted before Judge Rifkind in 1946 (the predicate conviction alleged in the government's information). Following an adverse finding, defendant-appellant filed a civil application, which was taken as a petition for a writ in the nature of coram nobis, to set aside his 1946 conviction. On February 6, 1975 Judge John M. Cannella denied the civil petition. That judgment is not a part of this appeal.

follows: Count One - 15 years in the custody of the Attorney General, $25,000 fine, and five years special parole; Count Two - 20 years and $20,000 fine; and Count Three - 15 years, $25,000 fine and five years special parole. The sentence specified that the prison terms run concurrently and that the fines are committed fines.

Defendant-appellant appeals from the District Court's judgment of conviction and sentence.

STATEMENT OF FACTS

We note at the outset that no sufficiency of the evidence view is raised in this appeal. Basically, the government's case depended on the bargain for and impeached testimony of several self-confessed accomplices whose credibility, or the lack of the same, became the issue at trial. Thus, our statement of facts does not rehearse the evidence at any great length but instead attempts a brief overview, giving the government its due as appellant, see Glasser v. United States, 315 U. S. 60, 80 (1942), and focusing in detail only on those facts directly relevant to the fair trial issues involved in this appeal. Such further facts as necessary are stated in the Argument.

The Government's first witness, Juan Antonio Redondo-Pedrazas, was an unnamed, unindicted co-conspirator called as a surprise witness by the government to testify to certain events occurring prior to the earliest date alleged in the indictment and prior to the alleged formation of the conspiracy. Pedrazas, a self-confessed smuggler, testified as to being in charges of the finances of a million dollar drug smuggling scheme in 1968 through 1970. He testified, among other things, that he saw defendant Torres at the apartment of co-defendant Yolanda Sarmiento when two demijohns containing 3 kilos each of cocaine arrived (Tr. 62-63). After a number of unsuccessful attempts, he identified defendant Torres in the courtroom as the person he spoke of. He further testified that in

April of 1970 he was in Buenos Aires, Argentina, with Yolanda Sarmiento and a number of others. He said that Sarmiento directed him to go to Miami, Florida. During this trip to Miami (which involved the alleged payment of $50,000 by defendant Torres to Sarmiento for drugs) he was told by Sarmiento that Torres was one of her best customers. (Tr. 94-102). The alleged payment of $50,000 was said to be an advance payment for a transaction involving 100 kilos of narcotics -- a transaction not pleaded in the instant indictment.

Recognizing that Redondo-Pedrazas' testimony was beyond the scope of the indictment and constituted evidence of other crimes, the trial court permitted its introduction to show the defendants' "[illegible]orlivity" to violate the narcotic laws (Tr. 14) and more specifically, to show that in connection with the anticipated forthcoming proof of activities occurring within the scope of the indictment, that the defendants "weren't doing it because of mistakes, inadvertance or in good faith" (Tr. 55-56) (See also Tr. 78-79, 85, 1691-1692).

Neither defendant was able to post the amount of bail set and therefore each spent the trial in custody. During the testimony of Redondo-Pedrazas and during the second day of trial, the United States Marshal who had charge of the defendants permitted them during a lunch recess to be displayed manacled and in custody to jurors in the courthouse corridor. Upon being advised of this incident,

the court denied a motion for mistrial but stated "on the other hand, I don't think this should happen again" (Tr. 155). Additionally, the Court voir dired the jurors and learned that most of them had seen the defendant in the hall at the lunch recess. Two admitted to seeing "something unusual" (Tr. 188) but upon closer questioning claimed they would not be affected by the revelation. Since one of them had mentioned the incident to a third juror, she too was questioned. That juror, however, admitted that the defendants' being in custody might affect her and accordingly she was excused (Tr. 187-194).

Alfredo Mazza was a robber, forger, perjurer, and unindicted co-conspirator who testified as a witness for the government. Mazza testified that following his release from prison in April of 1970 he took steps to establish himself in narcotics smuggling. He thus sought out Elsa La Turca, another unindicted co-conspirator, and shortly afterwards met Wladimir Bandera and Yolanda Sarmiento, who were indicted herein as co-defendants. Shortly an agreement was reached between Mazza, Sarmiento, La Turca, and Juan Carlos Franco, also known as Miguel Aspilche, resulting in a trip to the United States to locate narcotic buyers. Mazza and Aspilche (referred to throughout the trial as Miguel) met in a New York restaurant with unindicted co-conspirator Enrique Lopez, also known as El Gallego. The two also met with unindicted co-conspirator Rodolfo Ruiz, also known as The Painter, who suggests the idea of smuggling drugs inside the frames of paintings.

While in New York Mazza also was introduced to Alfredo Aviles, an unindicted co-conspirator, and several other buyers.

Following Mazza's return to Buenos Aires, there are seven shipments of paintings to New York between October of 1970 and September of 1971. Mazza is involved in the first, second, fourth and seventh shipments occurring respectively in October and December of 1970 and April and September of 1971. The Government apparently does not contend that any of these shipments were received by defendant Torres. The last load of picture frames containing secreted narcotics was seized by federal authorities in New York.

Mazza's testimony contains narrative hearsay attributed to other co-conspirators implicating defendant Torres on the subject of narcotics dealings (Tr. 271, 336, 345-346). He also testified to directly negotiating with Torres about drugs (Tr. 332-334, 336, 345). Additionally, his testimony dragged in hundreds of kilos of narcotics unrelated to the indictment at hand (Tr. 314-315, 337, 380, 384, 411-412, 430). He also testified that while inside of the United States he never sold, delivered, or saw anyone else sell one grain of narcotic drugs to defendant Torres (Tr. 457-458).

Wladimir Bandera, a co-defendant facing 40 to 50 years imprisonment on a number of indictments (Tr. 594), testified as to his dealings with Elsa La Turca, Yolanda Sarmiento, and Miguel.

Bandera testified essentially that he participated in the fifth and sixth shipments of the paintings concealing contraband drugs. The May 1971 shipment is said to have resulted in the ultimate delivery of cocaine to defendant Torres. The July/August 1971 shipment is said to have resulted in the delivery of heroin and cocaine to unindicted co-conspirator Lorenzo Cancio. Bandera denied that he had any partnership or deals with Mazza (Tr. 787, 789) and further stated that he only saw Mazza twice before they were in jail together (Tr. 790). Bandera testified to no direct acts or admissions by defendant Torres other merely that he had met him at the end of 1968 or the beginning of 1969 with Yolanda Sarmiento at a restaurant in New York (Tr. 496). He did relate some narrative hearsay which inculpated Torres,(e.g. Tr. 517, 524).

Lorenzo Cancio testified as the government's last asserted accomplice witness. A convicted parole violator and narcotics trafficker, Cancio agreed to the characterization of a gun-toting tough guy. At the time of his trial testimony, Cancio faced three pending federal felony indictments and a ten-year prison sentence conferred on him by the Honorable Milton Pollack despite Cancio's status as a "cooperator" because of what Judge Pollack regarded as blatant perjury committed in his court. Nonetheless the prosecution, in exchange for further cooperation, had promised to appear before the Parole Board and intercede on his behalf for early release.

In January of 1971 Cancio said he met Enrique Lopez (El Gallego), Miguel, and co-defendant Roberto Rivera at a New York restaurant. By May Miguel trusted Cancio to collect from Rivera a substantial sum of money due to him at a time coinciding with the arrival of the fifth shipment of the narcotics-stuffed antique picture frames. Cancio testified he received the money from Rivera but on May 22nd Cancio was arrested for his own drug dealing activities and, after promising to cooperate with federal officers, posted the money to meet his then reduced bail.

Subsequently, unbeknownst to the federal agents, Cancio participated in the July/August shipment by Bandera and Miguel as the whole domestic purchaser for the 25 kilos of heroin and 5 kilos of cocaine there involved and he then distributed these narcotics for hundreds of thousands of dollars, to a number of co-defendants not on trial below.*

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* The July/August 1971 transaction was the most elaborate way used to import the contraband, or at least the evidence of membership was most elaborate. Co-conspirators Coco Salgado and Atilio Boca were said to have been the South American sources for the 25 kilos of heroin and co-conspirator Alberto Navarro-Diaz (with perhaps a little help from his wife, Yolanda Sarmiento) the South American source of the 5 kilos of cocaine. Co-conspirator Bandera, of course, assembled these narcotics and together with co-conspirator Miguel (and of course with co-conspirator Ruiz, The Painter) accomplished the smuggling. Co-conspirator Cancio then took delivery in New York and re-sold the drugs to co-conspirators Nelson Garcia, also known as Cadillo, Ralph Madonna and Miguel Garcia.

Co-conspirators Anthony Torres and Roberto Rivera, the only two defendants on trial, were not a part of this transaction. Taking the government's evidence at its best, Torres would have liked to have been in this chain.

To increase Cancio's cooperativeness the government paid unindicted co-conspirator Alfredo Aviles $5,000 to make a further narcotics case against Cancio. As a result, on October 1, 1971, Cancio was arrested again. He continued, however, to deliver lies to the federal authorities (Tr. 1197).

Undisputedly, Cancio knew Anthony Torres and met with him on occasion. And, if his testimony is credited, he discussed narcotics dealings with Torres as charged.

Documentary evidence and some very limited surveillance evidence were also introduced during the trial and tended to corroborate the movement testified to by some of the witnesses.

Finally, the prosecutor's summation led off with an appeal for the jury not only to protect the rights of the accused but also to protect society from the people who bring narcotics into New York. Although defense counsel objected to the prosecutor's assertion that this was a function of the jury, the Court overruled the objection (Tr. 1652-1654).

INTRODUCTION

This drug case is another instance of prosecutorial over-kilo. The trial at which defendant-appellant Torres was convicted featured the acts and declarations (including narrative hearsay) of 13 co-defendants -- of whom one was available for cross-examination -- and of seven named, unindicted co-conspirators -- of whom two were available for cross-examination. By the expedient of its broad sweeping narcotics conspiracy indictment, embracing seeming multiple conspiracies, the prosecution succeeded in bombarding the jurors with testimony of heroin and cocaine, kilo upon kilo, having little or no arguable relationship to either defendant standing trial. It is in the debris of such a trial that defendant's claims of error must be gauged.

1. The opening prosecutorial shot was smuggler Rendondo-Pedrazas, a surprise witness, an unnamed, unindicted co-conspirator, called to testify to inflammatory but unnecessary evidence of other crimes occurring prior to the alleged formation of the conspiracy and at the very fringe of the statute of limitations.

2. On the second day of trial the Marshals inadvertently paraded the defendant manacled in custody before the jurors, reinforcing the image that he was a "bad man" who could not be trusted with liberty and who should be convicted on the basis of his character rather than the particular evidence in the case.

3. Finally, to cap the prejudice, the prosecutor began

his final argument by appealing to the anti-drug passion and prejudice of the jurors and misinforming them that the jury's function -- rather than to serve as a fair and impartial factfinder -- was to protect the public from people who are supplying New York with narcotics (Tr. 1652-1654), "who make it all possible for kids to get hooked" (Tr. 1725).

Such error would be problematical in any case. But so long as the multiple-defendant, multiple-kilo narcotics indictment remains and is sanctioned as the weapon of choice in the government's war on drugs, e.g., United States v. Ortega-Alvarez, 506 F.2d 455 (2nd Cir. 1974) (per curiam), then the survival of a fair trial itself is doomed when the jury is further bludgeoned with evidence and argument creating an extraneous and odious issue that the defendant is an evil person committing a heinous crime.

We are encouraged by the recent warning this Court has served on the government that the conspiracy weapon must be wielded with more discrimination and sensitivity. See United States v. Sperling, 506 F. 2d 1323, 1340-1341 (2nd Cir. 1974). And we urge that in the context we speak of, if Justice is both to be done and manifestly to be seen to be done, cf. Communist Party of U.S.A. v. S.A.C.B., 351 U.S. 115, 124 (1956), no matter how "acute" the "national problem created by the illicit traffic in narcotics" and how great the "personal revulsion at the activities sought to be federally proscribed here", cf. United States v. Jones, 308 F. 2d 26, 33 (2nd Cir. 1962)

(en banc) (Waterman, J.) and no matter how "bad" the people who appear in these cases may sometimes seem, cf. United States v. Bufalino, 285 F. 2d 408, 418-419, 420 (2nd Cir. 1960) (Lumbard, C. J.; and Clark, J., concurring), then reviewing courts must resolutely apply our laws with a purpose of public rage during a broad-sweeping conspiracy trial. The trial below did not satisfy that standard: this Court should reverse the defendant's conviction and remand for a new trial.

I.

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF "OTHER CRIMES" SINCE NO ISSUE WAS RAISED SERVING AS AN ENTRE FOR SUCH EVIDENCE, SINCE THE EVIDENCE INTRODUCED WAS NOT "CLEAR AND CONVINCING", AND SINCE THE PROBATIVE WORTH, IF ANY, WAS PLAINLY OUTWEIGHED BY THE PREJUDICIAL IMPACT.

The testimony of the government's kick-off witness was out of bounds. Surprise witness Redondo-Pedrazas thought only to disclose events not put in issue by the Grand Jury. Indeed only events which preceded the earliest date mentioned in the already rather stale charges of the indictment. Thus, the defendant, confronting a most unwielding indictment to begin with instantly was called upon to defend against, and the jury to consider, evidence of other even more remote conspiracies.

The prejudicial impact of Redondo-Pedraza's testimony is not to be doubted. Among other things, he not only initially inculpated defendant in an undefined conspiracy to smuggle cocaine concealed in demi-johns but also afterwards placed him in the thick of a one hundred kilo heroin transaction in Miami. The testimony of this single, huge centi-kilo transaction at once lobs merely as much narcotics into the jury box as can there after be accounted for in all seven antique picture frame shipments combined (most of which transactions, incidentally, Torres concededly was not a party to). Thus began Torres' trial.

The trial court admitted this evidence of other crimes instructing the jury that, if accepted, it was probative of the defendants' "proclivity" (Tr. 14) to wilfully and knowingly violate the

law and it is showed they "weren't doing it because of mistake, inadvertence or in good faith" -- although the Court did not purport to admit the evidence on the general issue (Tr. 55-56, 78-79, 85, 1691-1692, 1741-1743). And, further, the prosecutor was permitted to make vigorous use of the Redondo-Pedrazas testimony information (Tr. 1690-1694).

The Eighth Circuit Court of Appeals, reversing a narcotics conviction, recently had opportunity to set forth the standard for admission of evidence of other crimes. In United States v. Clemons, 503 F.2d 486, 489 (8th Cir. 1974), it stated as follows:

> "The general rule is that evidence of other crimes by the accused, not charged in the indictment and not part of the same transaction or occurrence charged therein, is inadmissible. The defendant is to be convicted, if at all, on the evidence showing him to be guilty of the particular offense charged. To admit evidence of other crimes possibly committed by the defendant prejudices him before the jury . . . .
> "There are, however, some narrow exceptions to that general rule of exclusion. As we have often observed, where there is a genuine issue as to identity, motive, intent, pre-conceived plan, entrapment, or absence of mistake or accident, evidence of other crimes may be admissible if carefully limited to that issue . . . .
> "Before any such evidence is admitted, however, it must be shown that (1) an issue on which other crime evidence may be received is raised; (2) that the proferred evidence is relevant to that issue; (3) that the evidence is clear and convincing; and (4) that the probative work outweighs the probable prejudicial impact."
> (citations and footnote omitted)

See also United States v. San Martin, 505 F. 2d 918 (5th Cir. 1974); United States v. Bozza, 365 F. 2d 206 (2nd Cir. 1966).

In the case at hand it seems elementary at the very threshhold that the trial court should not have admitted the evidence for the purpose of showing the defendant's "proclivity" to commit crimes. This invites the jurors, indeed, instructs them to consider whether the defendant is a "bad man" in asserting whether or not he is guilty of the crimes charged. But, as stated by the Fifth Circuit Court of Appeals in United States v. San Martin, supra, 505 F. 2d at 923:

> ". . . if there is one clear category that is not an exception to the general rule against allowing evidence of prior acts, it is that which includes 'character, disposition and reputation.' Michelson v. United States, supra, 335 U.S. at 475, 69 S.Ct. 213. See also, Railton v. United States, 127 F.2d 691, 692 (5th Cir. 1942); Hurst v. United States, 337 F. 2d 678, 680 (5th Cir. 1964). (Emphasis in original)

In light of the foregoing we doubt that there is any reason in this case to consider whether the criteria are met for invoking one of the exceptions to the general rule. For the sake of argument, however, we briefly turn to these questions.

First, there was no genuine issue, indeed, no issue at all, upon which evidence of other crimes would be admissible. Nor -- assuming that the exception may precede the occasion -- for its use

without bothering the occasion* did any genuine issue such as "mistake, inadvertence, good faith, wilfullness, knowledge, or even identity or preconceived plan," seriously arise.

Second, the Redonzo-Pedrazas testimony cannot be regarded as "clear and convincing" proof of prior crimes. Putting aside the questions of the suspect source, this witness only flashed the message of criminality but certainly did not detail proof of other crimes.

Third, whatever the legitimate probative work of this "bad man" evidence, the prejudicial impact surely outweighed it. It is precarious enough in these times simply to stand trial as a defendant in a narcotics case. To be also deliberately portrayed as a one hundred kilo, hard drug peddlar based on surprise collateral evidence is simply too much.** In United States v. Clemons, supra, 503 F. 2d at 491, the 8th Circuit cited Judge Heaney's words in United States v. Crawford, 438 F. 2d 441, 446 (8th Cir. 1971):

> "In today's society, possibly no act is more abhorred than the selling of narcotics. And nothing makes this more difficult for a defendant to receive a fair and unbiased trial is for the jury to think that the defendant or his acquaintences are men of bad character."

We can find no more fitting words to conclude this Point on.

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* We do not believe that otherwise inadmissible testimony of this type can be admitted into evidence in speculation that it may be narrated later, since the initial admission will, of course, inevitably tend to shape the subsequent course of the trial.

** It cannot be answered that because Judge Cannella was not himself unduly impressed with the Redonzo-Pedrazas testimony (Tr. 1741-1744, 1747) the jury therefore was not affected. The prosecutor was permitted to argue the evidence (Tr. 1690-1694) and the court instructed the jury throughout that it was the exclusive judge of the facts (e.g. Tr. 1729)

II.

THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL WHEN DURING THE SECOND DAY OF TRIAL THE DEFENDANT WAS EXPOSED TO THE JURORS AS A MANACLED PRISONER IN CUSTODY BECAUSE SUCH DISPLAY REINFORCES OTHER ERROR IMPROPERLY INJECTING THE DEFENDANT'S CHARACTER AS AN ISSUE AND DENIES THE DEFENDANT THE PRESUMPTION OF INNOCENCE.

During the second day of trial and while Redonzo-Pedrazas was still the witness, the United States Marshal entrusted with the custody of the defendants apparently inadvertently* displayed them in the corridor during the lunch recess to the view of the jurors. The defendants, of course, were in custody and handcuffed. Thus, the jurors noting this occurrence must have inferred that the defendants were serving sentences for other crimes (a fact which was not true), that they were denied bail on the charges on trial (a fact which was not true), or that bail was set so high that the defendants could not post it (the truth). Needless to say, none of these possibilities are flattering to the defendant. Nor is the display of them shackled in custody, treated like criminals, salutory to the presumption of innocence. Kennedy v. Cardwell, 487 F. 2d 101 (6th Cir. 1973)(Scholarly opinion by Circuit Judge Miller).

We do not doubt for a minute that such a sudden irregular encounter between the accused and his triers is inherently prejudicial.

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* We are disappointed to note that a repetition of the events was permitted to occur even after Judge Cannella's warnings (Tr. 876-877).

Kennedy v. Cardwell, supra, 487 F. 2d 107, 109-110. Cf., Turner v. Louisiana, 379 U.S. 466 (1965). In the case at bar one juror even admitted the fact and was accordingly discharged. Nor was the trial court's voir dire suggesting the defendants' poverty likely to circumvent such prejudice. New York City jurors are surely aware of such innovation as the Bail Reform Act of 1966 and know that in federal court the question of bail revolves less around wealth and more around "the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearances at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings". 18 U.S.C. Sec. 3146(b). The real question is efficacy of the voir dire process itself. And, at least for the federal court, that question seems answered by Marshall v. United States, 360 U.S. 310 (1959) (per curiam). See also, Bruton v. United States, 391 U.S. 123 (1968).

In Marshall, the Supreme Court reviewed a conviction following a trial where some jurors had been exposed to newspaper articles revealing the defendant's prior criminal difficulties. Even though the jurors who there admitted having read the article all assured the trial court they were not influenced, the Supreme Court reversed the defendant's conviction on supervisory power grounds.

Marshall, we submit, should be followed here where other forces, in addition to the shackled encounter, were also at work eroding the presumption of innocence, where the second witness in the case had not even been reached yet, and where the testimony of the first witness was itself of at least dubious propriety.

III.

THE PROSECUTOR COMMITTED REVERSIBLE ERROR WHEN HE ARGUED IN SUMMATION, OVER OBJECTION, THAT THE JURY HAD A DUTY TO PROTECT THE PUBLIC FROM THE PERIL OF NARCOTICS, SINCE THIS APPEAL TO PASSION AND PREJUDICE COULD ONLY SERVE TO FURTHER AROUSE THE JURY AND ASSURE THAT THE VERDICT WOULD NOT BE BASED SOLELY ON THE EVIDENCE PROPERLY ADMITTED.

If the presumption of innocence had not already been interred by the end of the trial, the prosecutor finished the job off. Heaped on the first shovel of his summation was a not too blatant appeal for the jurors to vent against the defendants their revulsion towards narcotics, an appeal predicated on the beguiling but erroneous and dangerous view that one of the jury's function was to protect society from the onslaughts of drug traffickers (Tr. 1652-1653).

> "MR. LITTLEFIELD: Now, your jury service is, of course, a very important duty as other counsel have told you. There is perhaps no higher duty that a citizen can perform in our system than to participate in the effective implementation of justice, which is what the jury system is. Of course, defense counsel have pointed out at length that one of the functions of the jury is to protect the innocent and of course that is one of the functions of the jury.
>
> But equally important is its other function and that is the function to protect the public from people who are buying narcotics here inNew York and enabling these smugglers to go back to South America with all the money. Do you think the smugglers could function if there weren't people in New York to buy narcotics here?
>
> So you can well understand in this case the need of society to be protected against people who are buying these vast amounts of narcotics

in New York. Because, after all, we are not talking about sugar or anything like that, we are talking about heroin and cocaine, over 152 kilograms of heroin and cocaine; 330 pounds, almost 1/6th of a ton, bought here by the buyers, including Lopez, Cancio, Tony T, Roberto Rivera, Aviles.

Who is it that pays the bundles of money to these international smugglers if it is not the buyers here in New York, these men, who is it?

MR. SCHWARTZ: Your Honor, I think he is getting into areas that are substantially prejudicial and I object.

THE COURT: Overruled.

MR. BROWN: I will note by objection for the record.

THE COURT: Overruled.

MR. LITTLEFIELD: No wonder our balance of payments is in such poor condition when money like that it pouring out of the country."

Apparently not satisfied with the power of subtle persuasion the prosecutor ended his summation with this (Tr. 1725):

"There is no place for sympathy here. This is not, after all, a case about kids, junkies buying $5 bags in the streets. This is a case about the men, smugglers and buyers, who make it all possible for kids to get hooked.

Roberto Rivera and Anthony Torres, Tony T, the government submits, are guilty beyond any doubt."*

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* No objection was made to this, possibly in view of the court's previous reaction to the similar argument.

Such inflammatory prejudicial statements to the jury constitutes reversible error. United States v. Fullmer, 457 F. 2d 447 (1972). In United States v. Fullmer, supra, a prosecution for selling firearms without proper licensing, the prosecutor's argument was described as follows at 457 F. 2d at 449:

> " The prosecutor told the jury 'We have filed the case here under the Gun Control Act of 1968, which was passed by Congress to provide support for Federal, State and local enforcement agencies and officials in their fight against crime and violence . . . .' An objection by defendant's counsel was overruled by the Court.
> Also, the prosecutor stated 'I don't have to tell you ladies and gentlemen, what is happening today in our country with people -- not the man who shoots his wife or that kind -- but people who are using ammunition and guns for sniping and creating disturbances, and so forth.' Again, an objection by defendant's counsel was overruled by the trial court."

The prejudice instilled here by the prosecutor's appeal to passion and prejudice -- law and order -- must certainly have been at least equal to that stand by the inflammatory comments in United States v. Fullmer, supra. In the peculiar circumstances of the instant case, the prosecutor's summation necessarily denied the defendant a fair trial.

CONCLUSION

For all of the foregoing reasons, separately or in aggregate, defendant's conviction should be reversed with instructions to grant him a new trial.

Respectfully submitted,

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People v Jones - Krieger

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 16 day of April, 1975 deponent served the within Brief upon M. S. Attorney

attonrye(s) for Appellee

in this action, at M. S. Courthouse
Foley Sq
New York, NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
16 day of April, 1975.
William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976